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In The

Supreme Court of the United States

AARP; JACK W. MACMILLAN; FRANK H. SMITH, JR; FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that works nationwide to promote the independence and well-being of low-income older persons in this country. For approximately thirty-five years, NSCLC has served that population through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC has participated in numerous cases, advocating on behalf of the rights of older persons. *See, e.g., Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) (bringing Section 1983 suit against state health officials seeking regarding home and community-based services as alternative to Medicaid institutional nursing facility services); *Lutwin v. Thompson*, 361 F.3d 146 (2d Cir. 2004) (representing class in case against Health and Human Services Secretary alleging due process violations in connection with home health agencies' reduction or termination of services); *Rodriguez by Rodriguez v. DeBuono*, 162 F.3d 56 (2d Cir. 1998) (challenging implementation of task-based assessment programs which were used to determine amount of personal care services hours authorized for

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. *Amicus curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and that no person or entity other than amicus and his counsel has contributed monetarily to the preparation or submission of this brief.

eligible Medicaid applicants and recipients, brought on behalf of Medicaid eligible elderly individuals who suffered from mental disabilities); *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101 (5th Cir. 1993) (representing retired employee in challenging employer's method of calculating social security benefits, which were offset against money due employees under employer's pension plans, in violation of Employee Retirement Income Security Act).

NSCLC is particularly interested in ensuring that retirees are provided adequate health benefits, since health care costs represent an enormous and ever-growing financial burden on older persons. Since the resolution of this case bears directly on the extent to which employers may reduce or terminate older retirees' health benefits, NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' access to those benefits. Moreover, as set forth below, NSCLC respectfully submits that the decision of the United States Court of Appeals for the Third Circuit, upholding the regulation at issue without considering the pertinent constitutional implications, renders that decision indefensible.

STATEMENT OF THE CASE

This case addresses the legality of a proposed EEOC regulation that would allow employers to discriminate against older persons by reducing or

terminating retiree health benefits when a retiree reaches 65 years of age. *See* 68 Fed. Reg. 41,542, 41,547 (July 14, 2003) (exempting from anti-discrimination protection "the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program"). The parties and the Third Circuit have agreed, however, that Congress amended the Age Discrimination in Employment Act, 29 U.S.C. § 631, *et seq.*, (the "ADEA") to prohibit employers from discriminating on the basis of age, with respect to the provision of employment-related benefits. By adopting the regulation at issue, the EEOC has given employers license to do precisely what Congress intended to prohibit under the ADEA. Because the regulation unequivocally violates Congressional intent, it not only contravenes the ADEA as a statutory matter, but also runs afoul of fundamental separation of powers principles that are at the core of our Constitutional system. For this reason, as well as those set forth below and in the other brief filed in support of the petition for *certiorari*, the NSCLC urges the Court grant the petition for *certiorari* filed by the AARP in order to review the Third Circuit decision that upheld this troubling regulation.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IS INDEFENSIBLE BECAUSE IT FAILED TO CONSIDER THE VITAL CONSTITUTIONAL QUESTIONS IMPLICATED HERE.

Over twenty years after the Supreme Court issued its seminal decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, it remains axiomatic that an agency regulation that contravenes clear congressional intent is unlawful. *See* 467 U.S. 837, 842-43 (1984) (directing that if Congressional intent "is clear, that is the end of the matter for . . . the agency [ ] must give effect to the unambiguously expressed intent of Congress"). Frequently, however, courts – including the Third Circuit in its decision below – effectively ignore the separation of powers principles underlying that proposition, instead addressing the legality of an agency rule as a matter of mere statutory interpretation. That result is a dangerous one, as it loses sight of the constitutional import of ensuring that agencies do not encroach upon the legislative power vested in Congress alone.

Here, as discussed below, Congress amended the ADEA with the unambiguous intent to prohibit age discrimination in the provision of employment related benefits. As such, it is unimaginable that any court would uphold a regulation that permits the precise type of discrimination that the ADEA expressly sought to prohibit. Yet, in here upholding a regulation that permits discrimination based on age in the provision of retirement benefits, the Third Circuit did

just that. The NSCLC respectfully submits that the court was mistaken in disregarding the important separation of powers conflict that arises when an agency assumes the authority to adopt a regulation that effectively repeals the essence of the statute that it must enforce. Since the Third Circuit failed to meaningfully evaluate that constitutional question, its decision cannot stand.

A. Requiring The Executive Branch To Respect Congressional Intent Safeguards The Separation of Powers.

The importance of the separation of powers to the continued vitality of the Constitution cannot be overstated. Indeed, it is indisputable that, by creating a separation between three distinct branches of government, the Framers intended to prevent "the greatest tyranny," namely, "the accumulation of all powers . . . in the same hands. . . ." The Federalist No. 47, at 301 (C. Rossiter ed. 1961). It is equally well-settled that the Framers, who had themselves experienced the dangers of an all-powerful monarch, designed the separation of powers framework to prevent the Executive from usurping the power of the duly elected Legislative branch. *See Clinton v. City of New York*, 524 U.S. 417, 450-51 (1998) (discussing purpose of separation of powers doctrine, and warning that when the Executive is allowed to make, rather then execute the law, "liberty is threatened" because "increasing the power of the President beyond what the Framers envisioned, [ ] compromises the political

liberty of our citizens, liberty which the separation of powers seeks to secure"). In order to protect the liberty of the people, the Framers thus vested in the Congress the sole authority to make law, *see* U.S. Const. Art. I, § 1 (providing that "all legislative Powers granted herein shall be vested in a Congress of the United States," and permitting "no delegation of those powers"), leaving the President to "take care that the laws be faithfully executed," *id.* at Art. II, § 2. *See also Youngstown Sheet & Tube Corp. v. Sawyer*, 343 U.S. 579 (1952) (discussing constitutional design to ensure that President does not become the lawmaker).

Indeed, this Court has historically emphasized the constitutional importance of preventing the Executive branch from exceeding its authority. From the early days of the Republic, the Court has been vigilant in preventing the Executive branch from adopting rules that contravened Congressional intent, specifically because the Executive lacks the constitutional authority to ignore or alter clear statutory commands, and thereby to transform the power to execute the law into the power to make the law. For example, in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), this Court considered the case of a postmaster general who refused to credit mail carriers for their services, despite a statute requiring him to do so. In affirming the mandamus ordered by the lower court, the *Kendall* Court held that the Executive branch official lacked the constitutional authority to disregard a Congressional directive. The

Court explained that allowing the Executive branch to do so would impugn the separation of powers by "vesting the President a dispensing power, which has no countenance for its support in any part of the constitution, [thus] . . . clothing the President with a power to control the legislation of Congress." *Id.* at 613; *see also Morrill v. Jones*, 106 U.S. 466, 467 (1883) (holding that Secretary of Treasury violated separation of powers when he effectively amended a revenue statute, admonishing him for taking action "in excess of the power" of the Executive branch). Since then, this Court has remained faithful to the essential goal of protecting the separation of powers by consistently striking down Executive action that encroached on Congress's sole authority to make law. In its now famous decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 479 (1952), for example, the Court powerfully reaffirmed the importance of separation of powers, warning that:

> [i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . .

Id. at 867.

In the post-New Deal era, separation of powers issues are most commonly raised in cases challenging the authority of agencies, as members of the Executive branch, to adopt rules that allegedly contravene congressional intent. In reviewing those cases, this Court has not strayed from the basic rule articulated so clearly in *Chevron, supra* at 842-43: if Congressional intent "is clear, that is the end of the matter for . . . the agency [] must give effect to the unambiguously expressed intent of Congress." Indeed, the Court has put a finer point on that rule, instructing that agencies may not adopt regulations that effectively amend or repeal statutes and that Congress may not delegate to agencies the power to do so, since amending and repealing statutes is a distinctly legislative action, and therefore within the aegis of Article I. *See Whitman v. American Trucking Ass'n.*, 531 U.S. 457 (2001) (reaffirming that Article I, Section 1 of the Constitution "permits no delegation" by Congress of its legislative power); *Clinton*, 524 U.S. at 438 (recognizing that a statute may not be effectively repealed by Executive branch, but only through the proper Article I legislative process); *accord McComb v. Wambaugh*, 934 F.2d 474, 481 (3d Cir. 1991) (No regulation may override legislative intent and extend beyond the legislative scheme).

In applying these well-trodden principles, however, lower courts often appear to lose sight of the constitutional basis for their review of Executive agency action. As a result, courts frequently review agency rules that are alleged to contravene congressional

intent as matters of statutory interpretation, with nary a mention of the Constitution, or of the separation of powers principles so critical to its structure. Even *Chevron*, which enshrined the rule that agencies must respect clearly articulated congressional intent in the first step of the now famous "*Chevron* analysis," did not highlight the separation of powers underpinnings of that rule. 467 U.S. at 842-43 (setting forth the proper analysis to be employed when agency regulation has been challenged as inconsistent with congressional intent, but providing no discussion as to the constitutional basis for that rule); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that agency could not provide private right of action where statute did not, and issuing the vague warning that "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself"); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (rejecting regulation that is "inconsistent with the statutory mandate," yet providing no constitutional context); *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996) (striking INS regulation that contradicted purpose of statute under *Chevron* without any discussion of the separation of powers issues implicit in the rule that requires agencies to respect congressional intent); *Iglesias v. United States*, 848 F.2d 362, 367 (2d Cir. 1988) (striking INS regulation that contravened congressional intent evidenced in applicable statute, and providing – in a string cite – a warning that "there is no power to amend [a statute] by regulation"); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 437 (9th Cir. 1994) (overturning regulation exempting large

trucks from odometer disclosure required by statute, invoking *Chevron* deference and only cryptically referring to the danger of allowing "lobbyists to appeal from the legislative to the executive branch after a bill has become law"). This trend is troubling since, by painting the legality of an agency rule as a statutory question, courts have lost the urgency – so clearly expressed in this Court's early jurisprudence – of the need to maintain the separation of powers at all costs.

Although courts now rarely invoke the underlying constitutional principle in conducting the *Chevron* analysis, the importance of ensuring the vitality of the separation of powers has by no means diminished. As Justice Kennedy recently warned in a powerful concurring opinion, maintaining that constitutional framework "requires a stability which transcends the convenience of the moment," since "liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 449-450.

B. The Third Circuit Ignored These Important Separation of Powers Principles And, In Doing So, Failed To Consider The Important Constitutional Questions Implicated Here.

Given courts' tendency to gloss over the separation of powers issues implicated when an agency is alleged to have contravened congressional intent, it is

not surprising that the Third Circuit's decision upholding the EEOC regulation challenged here failed to meaningfully consider the constitutional implications of that regulation. Although the court invoked the talismanic rule that "no agency is permitted to effectively repeal any portion of a statute by regulation," it then simply c ncluded, in a short footnote, that the regulation is "not contrary to the terms and purpose of the ADEA and therefore does not present such a challenge," without providing any further explanation. *AARP v. EEOC*, 489 F.3d 558, 563 n.3 (3d Cir. 2007).

The Third Circuit, however, ignored the conflict that indisputably exists between the ADEA's essential purpose and the result that the EEOC regulation seeks to achieve. As the AARP has explained in detail in its brief, the unambiguous congressional intent underlying the ADEA has *never* been disputed: the parties and the Third Circuit agreed that the statute was intended to prevent employers from discriminating based upon age in the provision of all forms of employee benefits. *See Erie County Retirees Assoc. v. County of Erie,* 220 F.3d 193, 208-216 (3d Cir. 2000) (holding that the ADEA prohibits the practice of reducing retiree benefits based on age, *i.e.*, in response to Medicare eligibility); *AARP v. E.E.O.C.*, 390 F.Supp. 2d 437, 451 (E.D. Pa. 2005) (acknowledging that the EEOC has "conceded that the ADEA prohibits coordinating retiree benefits with Medicare eligibility"). Despite that clear congressional intent, however, the EEOC regulation does precisely what

the ADEA forbids, by inviting employers to discriminate by reducing or terminating retirement health benefits when an individual reaches 65 years of age. *See* 68 Fed. Reg. at 41,547, discussed *supra*. As such, in promulgating the regulation at issue, the EEOC effectively repealed the ADEA's essential anti-discrimination protection as applied to tens of millions of individuals. That result, however, simply cannot be squared with separation of powers principles, since it is well-settled that agencies lack the constitutional authority to repeal statutes by regulation and Congress lacks the constitutional authority to delegate to an agency the power to do so. *See Clinton*, 524 U.S. at 438 (the effective "repeal of statutes, no less than enactment, must conform with Art. I"); *accord INS v. Chadha*, 462 U.S. 919, 954 (1983); *AARP II*, 390 F.Supp. 2d at 453 (recognizing that "neither the parties nor this Court has found any case that sanctions congressional delegation to an agency of the authority to undo what Congress has done through clear and unambiguous statutory language"); *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 486-87 (7th Cir. 1997) (holding that agency had no authority to exempt trucks from furnishing odometer reading at sale, when statute explicitly states that all vehicles must do so, since regulation effectively repealed the statute and thus was "legislative in nature").

If the EEOC were permitted to undermine the essential purpose of the ADEA by way of regulation – as the Third Circuit erroneously concluded it should

be – the separation of powers would be no more. In order to prevent that impermissible result, and the constitutional violation that would flow therefrom, the Third Circuit should have conducted a far more exacting analysis, in order to ensure itself that deference to the agency would not upset the balance between the three branches of government. *See* William Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption*, 16 ENVTL.L. 1, 6 (1985) (urging courts to remain faithful to congressional intent in reviewing legislation and regulations, and to "discern a tolerably clear legislative intent before [] deferring to an agency"). As discussed above, however, rather than engaging in this stricter scrutiny, which is necessary to preserve our constitutional structure, the court left unresolved the obvious conflict that exists between the EEOC regulation and the ADEA's essential purpose. The Court's failure to confront and make an explicit part of its analysis, the separation of powers issues implicated by that constitutional conflict renders its decision indefensible. Indeed, the failure to the Court of Appeals to ever meaningfully address that conflict renders its decision a threat to the continued vitality of the separation of powers framework that forms the basis of the Constitution. The petition for *certiorari* should therefore be granted so that a meaningful consideration of the critical constitutional issues raised here may be conducted.

CONCLUSION

In failing to conduct the rigorous analysis necessary to determine whether the regulation at issue violates the legislative purpose underlying the ADEA, the Third Circuit failed to meaningfully consider the constitutional questions that arise when a regulation is alleged to have contravened clear congressional intent. In so doing, the court failed to fulfill its judicial duty to ensure that no member of the Executive branch encroaches on the legislative authority of Congress. As such, the court's decision below must not stand and, accordingly, the NSCLC respectfully submits that the petition for certiorari filed by the AARP should be granted.

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